

MUNGER, TOLLES & OLSON LLP

355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1500
TELEPHONE (213) 687-9100
FACSIMILE (213) 687-7002
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 4/25/11
SAN FRANCISCO, CALIFORNIA 94105-1407
TELEPHONE (415) 574-2000
FACSIMILE (415) 574-2077

April 18, 2011

Memo Endorsed

VIA FACSIMILE (212) 805-7900

The Honorable Kimba M. Wood
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Re: *Arista Records LLC et al. v. Lime Wire LLC et al.*,
Case No. 06 CV 5936 (KMW)

Dear Judge Wood:

Plaintiffs write to ask the Court to resolve a dispute about making witnesses who were not included on the parties' Initial Disclosures available for deposition. Plaintiffs have offered Mr. Bainwol and Ms. LaBarbera-Whites for deposition. Plaintiffs also requested that Defendants make George Searle, Lime Wire's CEO since 2007, available for deposition. Defendants did not include Mr. Searle in their Initial Disclosures, but rather disclosed him on their trial witness list. Although Defendants have accepted Plaintiffs' offer to take Mr. Bainwol's deposition (and declined the offer to take a deposition of Ms. LaBarbera-Whites), Defendants have refused to permit the deposition of Mr. Searle. For the same reasons the Court determined that Defendants should simply take the deposition of Mr. Bainwol and Ms. LaBarbera-Whites rather than demand the Court exclude them, Plaintiffs should also be permitted to cure any prejudice from Defendants' late disclosure of Mr. Searle by taking his deposition before trial commences. Because Defendants will not consent to produce Mr. Searle, Plaintiffs respectfully request that the Court order them to produce Mr. Searle for deposition before trial.

13708710 1

ROBERT K. JOHNSON
ALAN V. FRIEDMAN
RONALD L. OLSON
RICHARD B. VOLPERT
DEAN C. BROWN
ROBERT C. DENHAM
JEFFREY I. WEINBERGER
CARY B. LERMAN
CHARLES D. SEGAL
RONALD E. HYPER
DREDDY P. WONG
BRAD D. BRIAN
BRADLEY B. PHILLIPS
GEORGE M. GARDNER
WILLIAM D. TENK
STEVEN L. GUZE
ROBERT S. KRAUSS
STEPHEN M. KRUTOVICH
JOHN W. SPIEGEL
TERRY E. SANCHEZ
STEVEN M. PERRY
MARK D. HELM
JOSEPH D. LEE
MICHAEL R. DOVCH
MICHAEL E. DOLFF
DREDDY D. PHILLIPS
LAWRENCE C. BARTH
KATHLEEN M. McDONELL
GLENN D. POMERANTZ
THOMAS B. WALKER
DONALD C. HAUSMANN
PATRICK J. CAFFERTY, JR.
JAT M. FUJIMORI
DMALLEY M. MILLER
SANDRA A. BENJAMINSON
MARK H. FORTIN
HENRY WUZHIANU
KEVIN S. ALLRED
BART M. WILLIAMS
JEFFREY A. HEINTZ
JUDITH T. HAHN
KRISTIN LINNET HULES
WALTER D. DWORKIN
JEROME C. BOTT
STEPHEN D. ROEL
DANIEL T. VINCENT
TED CAINE
STUART M. SENATOR
MARTIN D. BERN

DANIEL F. COLLINS
RICHARD E. BRODYAN
ROBERT L. DELL'ANGELO
BRUCE A. ADRIOTT
JONATHAN E. ALTMAN
MATTHEW ANN TODD
MICHAEL J. O'BRIEN
REUT M. KLANA
DAVID S. GOLDMAN
BURTON A. GROSS
DEVIN S. MAGUCA
HOUDON HIRSH
ARISTIN A. ESCALANTE
DAVID C. DIMILLI
ANDREA WELLS JEFFRIES
PETER A. GETRE
PAUL J. WATFORD
CARL N. MOOR
DAVID M. ROSENZWEIG
DAVID M. ERY
LISA J. DEMSKY
MALCOLM A. RENIKRE
DREDDY J. WENDART
TAMERUN J. DODLEY
JAMES C. RUTTEN
J. MARTIN WILLIAMS
RICHARD BT JOHN
ROHIT A. BINKAL
LUI LI
CAROLYN WICKER LUSTINE
C. DAVID LEE
MARK F. KIM
BRETT V. RODGA
DEAN ESKOVITZ
FRED A. BOWLEN, JR.
KATHERINE H. FORTNER
BLANCA FROHM YOUNG
RANDALL O. SCHINCO
MARIA SEPTERIAN
MANUEL F. CACHAN
ROSEMARIE KING
JOSEPH J. VERRA
KATHERINE K. HUANG
MICHELLE T. FRIEDLAND
TODD J. ROSEN
BRIAN R. SZABO
LYNN HEALEY SCADUTO

ERIC J. LORENZINI
LINDA D. HICKS
PATI K. ANDERSON
BRYAN TOLUB BOYD
JENNIFER L. POLCE
JAN R. HOCHLUTNER
JAN R. DAVIDSON
JASON KANTANEN
JONATHAN M. BLAVIN
NAREN J. DERRIN
JULIA S. HIRAKI
MELINDA (ADEL) LEMONE
ANDREW W. SONG
JOHANN E. C. EDWARDS
JONAS GOLDMAN
JOSHUA P. GROSAN
VICTORIA L. BOESCH
HAILYN J. OREN
BRAD SCHNEIDER
GENEVEVE A. COX
MIRIAM KIM
NICHOLAS B. BANTING
BRIAN P. GUFF
ALEX KIMBERG
KATHARINE L. HALL
KATHERINE KU
KIMBERLY A. CHI
SHOSHANA E. BARNETT
TINA CHARCENPONG
LEE S. TAYLOR
DEREK V. KAUFMAN
KIMBERLY B. ENCHAD
WILLIAM J. SPIEGEL
DANIEL P. SANCHEZ
BETHANY W. KRISTOVICH
PAULA R. LEVY
DAVID C. YANG
WILLIAM E. CANO
ROBERT E. SOREN
BENJAMIN W. HOWELL
JACOB S. KRELIKAMP
JONATHAN M. WEISS
ELISABETH J. NEUBAUER
ERIC P. TUTTLE
HEATHER E. TAKAHASHI
KEVIN A. GOLDMAN
ROBIN KAL BACON
BERNARD A. ESKANDARI
JENNY M. JAMES
KEITH R. G. HAMILTON, II
BORATA S. KELLY
PATRICK ANDERSON
JEFFREY Y. WU
YUVAL MILLER
MARK A. CONRAD
DANIEL R. MCCARTHY
H. LANCE JASPER
AUSTIN BRAHMAN
ADAM R. LAWTON
PETER C. REHN
RACHEL L. STEN
AMI BRAZ
PIREET K. SANDHU
JAN J. MILLER
MARWA A. TORRES
DAVID S. HAN
DAVID C. LACPMAN
JENNIFER HONG
OLIVIA A. RUB
AARON BENI LORENZINI
DANIEL H. EUGENES
LAURA D. BHOLOME
MELISSA CAMACHO-NEUBAUER
SARALA V. NAGALA
JUSTIN L. M'KABNEY
LEO GOLDBERG
KIMBERLY A. FORNIE
MATTHEW A. MACDONALD
CAROLYN V. ZUBOVSKI
ERIC R. NGUYEN
ERIC E. SCHANNING
MARGARET O. ZIEGLER
ESTHER H. SUNG
RICHARD D. EBBENHADE
ALLISON S. STEIN
PETER K. YAM
SUSAN E. NASH
THOMAS T. CO
OF COUNSEL
E. LEROY TOLLES
4022-20061

WRITER'S DIRECT LINE
(213) 683-9132
(213) 683-5132 FAX
Glenn.Pomerantz@mtv.com

MUNGER, TOLLES & OLSON LLP

Hon. Kimba M. Wood

April 18, 2011

Page 2

Defendants have no principled reason to refuse to provide Mr. Searle for deposition. Mr. Searle replaced Mark Gorton as Chief Executive Officer of Lime Wire in 2007. But Defendants never disclosed Mr. Searle as a witness on whom they intended to rely either in their Initial Disclosures or any supplement to those disclosures. Defendants have never explained why they did not list Mr. Searle on their disclosures. Defendants first listed Mr. Searle as a potential witness when they served their witness list, on March 18. Thus, under all the same law and arguments relied upon by Defendants in their motion to exclude Mr. Bainwol and Ms. LaBarbera-Whites, Mr. Searle's exclusion would be warranted as well. Plaintiffs have objected to Mr. Searle on this basis. *See* Doc. No. 666 at 19 (Joint Pretrial Order). Defendants have never offered a deposition of Mr. Searle, and have refused the deposition when Plaintiffs requested it. *See* Ex. A (email from G. Pomerantz to T. Mundiya, April 16, 2011).

The Court should order Defendants to present Mr. Searle for deposition. Rather than exclude Mr. Bainwol and Ms. LaBarbera-Whites from testifying at trial, the Court held that "there is still time" to take their depositions. April 14, 2011 Hrg., 13:17-14:3. The opportunity to depose these witnesses will cure any prejudice Defendants claimed from Plaintiffs' failure to include them on their Initial Disclosures. The same is true for Mr. Searle – adequate time remains before trial to permit Mr. Searle's deposition, which would cure the prejudice from Defendants' failure to disclose him. Defendants cannot complain of hardship. Indeed, Plaintiffs have already offered to make two witnesses available shortly before trial, and are asking that Defendants present only one. Yet without Mr. Searle's deposition, Plaintiffs will be deprived of the opportunity to learn what Defendants intend to present him to testify about at trial.

Because there is no legitimate basis to distinguish Mr. Searle from Mr. Bainwol and Ms. LaBarbera-Whites, Defendants should be compelled to offer Mr. Searle for deposition. Indeed, the only ground Defendants could offer to distinguish Mr. Searle in an attempt to justify their refusal is that Plaintiffs did not move to exclude Mr. Searle. But allowing that to serve as justification would essentially reward Defendants for making an unsuccessful motion, while penalizing Plaintiffs for electing to follow the course the Court directed in denying Defendants' motion. Plaintiffs respectfully request, therefore, that the Court order Defendants to make Mr. Searle available for deposition.

Sincerely,



Glenn D. Pomerantz

cc: Joseph Baio (via facsimile and email)
13767666.1

Having reviewed defendants' arguments made in their letter dated 4-19-11, I order that this request be granted. He shall be made available this week, if Plaintiff's wish to depose him this week. KMW

4-19-11

SO ORDERED, N.Y., N.Y.

Kimba M. Wood
KIMBA M. WOOD
U.S.D.J.